

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1' NEW DELHI**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 5930/Del/2012
Assessment Year: 2008-09**

**ITA No. 1630/Del/2014
Assessment Year: 2009-10**

C.R.M. Services India Pvt. Ltd., 220, Vinobha Puri, Lajpat Nagar-II, New Delhi-110024 (Appellant)	vs	Dy.Commissioner of Income Tax, Circle 3(1), New Delhi. (Respondent)
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Appellant by : Shri Ajay Vohra, Sr. Adv.
Shri Abhishek Aggarwal, CA
Respondent by : Shri Sanjay I. Bara, CIT DR

**Date of Hearing: 20.02.2018
Date of Pronouncement: 14.05.2018**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

Both these appeals have been preferred by the assessee. ITA 5930/Del/2012 pertains to assessment year 2008-09 and is preferred against the final order dated 29.10.12 passed by the Assessing Officer consequent to the order of the Hon'ble Dispute Resolution Panel (DRP) dated 27.09.2012. ITA 1630/Del/2014 is assessee's appeal for assessment year 2009-10 and is preferred

against the final assessment order dated 28.01.2014 passed pursuant to the directions of the Hon'ble DRP dated 29.11.2013. Both these appeals were heard together and for the sake of convenience, they are being disposed of through this common order.

2. Brief facts of the case are that the assessee company is a company incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of TP USA Inc. The assessee, during the year under consideration, was engaged in the business of providing voice-based call centre services on behalf of US clients to the customers in USA. The return of income was filed declaring Nil income after claiming set off of brought forward losses of Rs. 46,19,840/- under normal provisions of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and book profit of Rs. 4,16,46,936/- u/s 115JB of the Act.

2.1 During the relevant previous year, the assessee had entered into the following international transactions with the Associated Enterprises (AE):-

i) Payment of royalty to M/s TP USA - Rs. 90,38,675/- by using TNMM method

ii) Provision of Information Technology Enabled and related Services {ITES} (both outbound and inbound) to the customers/clients in USA – Rs. 44,72,17,544/- by using TNMM method.

2.2 In the transfer pricing documentation, the assessee determined Arm's Length Price (ALP) of the international transaction of provision of ITES services and payment of royalty by applying TNMM by taking itself as the tested party and applied Operating Profit by Cost (OP/OC) as the Profit Level Indicator (PLI). The Profit Level Indicator was computed at 28.30% after considering the expenditure on account of payment of lease rent for the unutilized capacity amounting to Rs. 1,34,28,691/- as non-operating expenses and adjustment on account of lower realization of export proceeds on account of devaluation in the value of Indian currency vis-à-vis US dollar due to fluctuation in the exchange rate and amounting to Rs. 4,67,25,395/-. The assessee had selected 10 companies as comparables in the transfer pricing documentation whose Profit Level Indicator was 2.14%. Since the operating profit margin of the assessee at 28.30% was higher than the operating profit ratio of the comparable companies at 2.14%, the international transactions

undertaken by the assessee with the AEs were considered to be at arm's length price. During the year under consideration, the assessee had also paid royalty @ 2% amounting to Rs. 90,38,675/- to the Associated Enterprises (TP USA) in terms of the royalty agreement dated 2.1.2002.

2.3 The case was referred by the AO to the Transfer Pricing Officer (TPO) and on the basis of fresh search, the TPO and, thereafter, the Hon'ble DRP considered 19 companies with operating profit margin of 28.60%. The TPO in the order passed u/s 92CA (3) of the Act determined the PLI of the comparable companies for determining the ALP after allowing working capital adjustment of 6.70% at 21.90%. However, the TPO, while computing the operating profit of the assessee considered expenditure on account of payment of lease rent for unutilized capacity amounting to Rs. 1,34,28,691/- as operating expenses. The TPO further denied the adjustment on account of lower realisation of export proceeds on account of decline in the value of the Indian currency due to exchange rate fluctuation amounting to Rs.4,67,25,395/-. Accordingly, the TPO after making these adjustments, computed the operating profit margin of the assessee at 10.74% and, thereafter, determined the

adjustment at Rs. 4,50,89,611/- being the ALP of the international transaction in respect of receipt on account of call centre services. The TPO further determined the ALP of international transaction of royalty amounting to Rs. 90,38,675/- to be at nil by holding that no recognizable benefit had been derived from the assessee from the payment of such royalty expenses.

2.4 Aggrieved, the assessee approached the Hon'ble DRP. The Hon'ble DRP, however, did not accept the assessee's objection regarding adjustment of abnormal cost of Rs. 1,34,28,691/- on account of rent relating to unutilized capacity. In respect of foreign exchange fluctuation loss, the Hon'ble DRP directed the TPO to exclude the abnormal cost while calculating the profit level indicator of the assessee as well as the comparables. In respect of royalty, the Hon'ble DRP upheld the order of the TPO in determining the ALP of the royalty paid at Nil.

2.5 Now, the assessee has approached the ITAT and has challenged the final assessment order passed subsequent to the directions of the Hon'ble DRP.

3. At the outset, the Ld. AR submitted that ground nos. 2, 3 and 17 were the grounds which would be argued first and if these

grounds were adjudicated in favour of the assessee, the other grounds would become academic in nature.

3.1 The Ld. AR submitted that ground no. 3 challenging the denial of adjustment of abnormal cost of Rs. 1,34,28,691/- on account of rent and other maintenance expenditure relating to unutilized capacity held for domestic business had been wrongly made. It was submitted that during the year under consideration, the assessee had, vide agreement dated 7.8.2006, taken on lease a new and bigger premises at plot no. 398, Udyog Vihar, Phase 3, Gurgaon and had shifted the existing operations from plot no. 387, Udyog Vihar, Phase 3, Gurgaon to the new premises in the month of November 2006. It was further submitted that in the new premises there were 6.5 floors out of which only 4.5 floors were being utilized and two floors were lying unutilized and were being kept vacant for the purpose of domestic business since November 2006. The Ld. AR submitted that it is a matter of record that the idle premises were not utilized for rendering services to the associated enterprises and these were retained in anticipation of future growth of business and also for third party domestic business. The Ld. AR highlighted the fact that the assessee was not only providing

services to the AE but was also engaged in provision of services to uncontrolled entities. It was reiterated that the premises were taken on lease in anticipation of new business from third party for domestic purposes. It was further submitted that as a consequence of these two floors remaining underutilized, the assessee had incurred the idle cost in respect of rent and maintenance of unutilized capacity which was allowable as an adjustment for the purpose of computing the ALP. Ld. AR also submitted that the ITAT Delhi Bench in assessee's own case for assessment years 2004-05 and 2006-07 in ITA Nos. 4068/Del/2009 and 4796/Del/2010 respectively had upheld the assessee's claim towards adjustment of idle capacity under similar circumstances. Our attention was drawn to the relevant paragraphs in the said order and it was further submitted that these orders of the Tribunal had been affirmed by the Hon'ble Delhi High Court in ITA Nos. 618/2012 and 619/2012. The Ld. AR submitted that since this issue was covered in favour of the assessee by the order of the Tribunal and affirmed by the Hon'ble Delhi High Court, adjustment should be granted to the assessee for the cost of this idle capacity as well as other related costs. It was further submitted that if such an adjustment is granted,

then the adjusted operating margin of the assessee will be 16.34% which will be within the range of $\pm 5\%$ of the average margin of the comparable company at 21.90%.

3.2 With respect to ground no. 17 pertaining to royalty, Ld. AR submitted that the assessee had filed application for admission of additional evidence in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 to further substantiate its claim regarding its ALP not being treated as nil. It was submitted that the assessee is challenging the action of the Hon'ble DRP/Assessing Officer in holding that in terms of intangible and proprietary property as well as agreement dated 2.1.2002 entered into by the assessee with the AE, royalty was required to be paid only on proportionate sales made to third parties. Ld. AR submitted that by moving the application for admission of additional evidence, the assessee seeks to place on record Addendum to Intangible and Proprietary property and Licensing Agreement as additional evidence. It was submitted that this Addendum was effective from 2.1.2002 and it sets out the understanding between the parties and the actual conduct of business as undertaken between them. It was submitted that this Addendum was being sought to be placed for the first time

before the Tribunal as additional evidence and that this Addendum was essential to correctly appreciate the effective understanding and the real intention of the parties to the agreement. It was submitted that this evidence was being sought to be placed on record to rebut the conclusion arrived at by the lower authorities on a wrong interpretation of the terms of the agreement without regard to the actual conduct of business. It was further submitted that this additional evidence went to the very root of the matter for determining the ALP of international transaction relating to royalty. It was prayed that the additional evidence may be admitted.

4. In response, the Ld. CIT DR, with respect to the assessee's ground pertaining to unutilized capacity *vis-à-vis* rent, supported the orders of the lower authorities. Ld. CIT DR read out extensively from the order of the TPO as well as the directions of the Hon'ble DRP and submitted that the business of the assessee was a cogent mix of related and unrelated parties business and it was a little farfetched for the assessee to claim that the vacant premises had been intended to be used for third party business only. It was also submitted that more than 80% of the assessee's business came from related parties and, therefore, it was a little

incomprehensible as to why the assessee had kept a portion consisting of approximately 25% of the work area unoccupied for a period of almost 17 months. Ld. CIT DR vehemently argued that the assessee's claim for adjustment on account of under-utilization capacity in respect of rent and related charges should not be allowed.

4.1 Arguing on other issue relating to royalty, the Ld. CIT DR opposed the assessee's application for admission of additional evidence. It was vehemently argued that this Addendum to the agreement which the assessee was seeking to file at this stage was dated 2002 and, therefore, there was no justifiable reason for the assessee to have not filed the same before the lower authorities during the course of proceedings before them. Ld. CIT DR also placed reliance on the findings of the lower authorities in respect of royalty.

4.2 Ld. CIT DR also submitted that the Ld. AR should argue on remaining grounds and these grounds on which the ld. AR has advanced his arguments should be dismissed.

5. Coming to the assessee's appeal for assessment year 2009-10 in ITA No. 1630/Del/2014, Ld. AR submitted that the only effective ground in this appeal was pertaining to royalty and in

support of this ground, in this year also, the assessee was seeking admission of additional evidence in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963. It was submitted that for this year also, the assessee was seeking to place on record the Addendum dated 2.1.2002 in support of the assessee's arguments regarding royalty. The Ld. AR also submitted that the arguments on this issue in assessment year 2009-10 were identical to the arguments and pleadings as made by him for assessment year 2008-09.

6. In response, the Ld. CIT DR opposed the assessee's application for admission of additional evidence. It was vehemently argued that this Addendum to the agreement which the assessee was seeking to file at this stage was dated 2002 and, therefore, there was no justifiable reason for the assessee to have not filed the same before the lower authorities during the course of proceedings before them. Ld. CIT DR also placed reliance on the findings of the lower authorities in respect of royalty.

7. We have heard the rival submissions and perused the material available on record. As far as the issue of unutilized capacity is concerned, we find that the issue had come up before the Tribunal in assessee's own case in assessment years 2004-05

and 2006-07 and the Coordinate Bench of the ITAT Delhi, vide order dated 30.06.2011 in ITA Nos. 4068/Del/2009 and 4796/Del/2010 had accepted the assessee's contention that the assessee was entitled to get adjustment in respect of capacity under utilization. The ITAT had noted that the assessee had substantial risk of idle capacity and, thereafter, the ITAT went on to hold that transfer pricing adjustment was required to be made in respect of rent while working out the ALP. The facts in assessment year 2008-09 are identical and a perusal of the directions of the Hon'ble DRP also shows that even the Hon'ble DRP has accepted that approximately 25% of the premises of the assessee were lying vacant/idle during the year under consideration. Accordingly, on identical facts, it is our considered opinion that requisite adjustment should be allowed to the assessee on this issue. Accordingly, we restore this matter to the file of the Assessing Officer/TPO with a direction to work out the requisite adjustment for the idle capacity in respect of rent and related charges after giving assessee proper opportunity. Thus, this ground stands allowed for statistical purposes.

7.1 As far as the assessee's plea regarding adjustment in respect of royalty is concerned, we have duly considered the

assessee's application for admission of additional evidence which has been filed under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and looking to the facts and circumstances, it is our considered opinion that this Addendum to the agreement goes to the very root of the matter and it will suitably assist the lower authorities to reach a logical conclusion on the issue. Since the lower authorities did not have the benefit of examining this document, the matter has to be necessarily restored to the file of the Assessing Officer/TPO for deciding the issue of royalty afresh after duly considering this agreement and after giving due opportunity to the assessee to present its case. Accordingly, ground no. 17 in assessee's appeal for assessment year 2008-09 also stands allowed for statistical purposes.

7.2 Since the Ld. AR has stated that if ground nos. 3 and 17 are decided in favour of the assessee, the other grounds will become academic in nature, we are not proceeding to hear the arguments of either of the parties on the remaining grounds at the present moment. We, however, note that the assessee will be at liberty to raise these grounds again before the Tribunal at a future date, if it is so required.

8. In the result, the assessee's appeal ITA 5930/Del/2013 stands partly allowed for statistical purposes in terms of our directions as contained in the preceding paragraphs.

9. Coming to the assessee's appeal in ITA 1630/Del/2014, since we have already admitted additional evidence in respect of the issue pertaining to ALP of royalty in assessment year 2008-09, on identical reasoning, we admit additional evidence in this year as well. Since the lower authorities did not have the benefit of examining this document, the matter has to be necessarily restored to the file of the Assessing Officer/TPO for deciding the issue of royalty afresh after duly considering this agreement and after giving due opportunity to the assessee to present its case.

10. In the result, ITA 1630/Del/2014 also stands allowed for statistical purposes.

11. In the final result, both the appeals of the assessee stand allowed for statistical purposes.

This decision was pronounced in the Open Court on 14.05.2018.

Sd/-
(N.K. SAINI)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 14th MAY, 2018

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ITA No. 5930/D/2012
ITA No. 1630/D/2014
Assessment year 2008-09 & 2009-10

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

ASSISTANT REGISTRAR